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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/509,958	04/15/2005	Herbert Kurzinger	12742.105USWO	2999
23552	7590	04/01/2009		
MERCHANT & GOULD PC P.O. BOX 2903 MINNEAPOLIS, MN 55402-0903			EXAMINER SAYALA, CHHAYA D	
			ART UNIT	PAPER NUMBER
			1794	
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			04/01/2009	PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary

Application No.

10/509,958

Applicant(s)

KURZINGER ET AL.

Examiner

C. SAYALA

Art Unit

1794

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 21 January 2009.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-12, 14 and 16-18 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-12, 14, 16-18 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO/S508)
Paper No(s)/Mail Date _____
- 4) ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date _____
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: _____

DETAILED ACTION

Continued Examination Under 37 CFR 1.114

A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on 1/21/2009 has been entered.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

1. Claims 1-12, 14, 16-18 are rejected under 35 U.S.C. 103(a) as being unpatentable over GB 1351878, Axelrod and DE 3212406 in view of JP 57-43220 and Rossen et al. (US Patent 3851084) taken with Nonaka et al. (US Patent 4757948) and Blanchard et al. (US Patent 5143740).

The GB patent teaches a food bar for fish that has different layered sections, each section or layer containing a different type of feed. See col. 1 on page 2. See Fig.

2. The layers are also said to have different textures, one being hard and others, soft.

Note that at page 1, lines 80-85, the patent points to the embodiment of instant claim 10. Similarly, Axelrod teaches pellets used to feed fish that have different layers of various densities so that the pellets initially float and loosen some food from the outer layers before sinking further and loosening more food mid-level for fish that inhabit that level of water and then sinking to the bottom where the remaining food from the innermost layer of the pellet is released. See col. 2 and col. 3. Col. 3, lines 45+ show that the surface layer is provided with lard and gas-releasing capabilities. This addresses instant claims such as claims 3, 5, 10 and 13. Again, the patent does not teach making flakes. DE '406 discloses a fish feed which is in the form of layers wherein the layers of various colors, auxiliaries, nutrients or active compounds are applied as different layers and are compressed together, thereby achieving different patterns and color markings on the film or flake. The patent does not teach extruding the layers although compressing them using pressure rollers is shown.

JP '220 teaches a feed "in the form of plates" as feed for marine animals, that is made by extrusion and then flattened by a flattening press. See page 4, last paragraph and page 5, first paragraph. *Page 6, second paragraph describes the process in detail wherein the raw material mixture is extruded and then the pellets are flattened to the desired thickness by using rotating rollers.*

Rossen et al. teach a method of producing laminated food products wherein a plurality of dissimilar homogeneous doughs are coextruded. The patent states at col. 1, lines 20+ that the snack product is prepared by laminating layers of differing doughs to produce the resulting laminate, and the patent goes on to state that: "It has been

proposed that the individual layers may have different flavors, may have different textures, may be formed of substantially different materials, or may be different colors.” The patent shows that the doughs could have different viscosities also. Further at col. 10, lines 13-16, the patent teaches that the dissimilar doughs are then extruded and further processed such as being flaked with flaking rolls (see also col. 3, lines 27-28 and claims 1 and 2). At col. 4, lines 53+, patentees describe extruding the materials so that a solid concentric extrudate is formed using a coextrusion method wherein the product such as in Fig. 23 is obtained. A cylindrical center of one material and a layer of a second material around it is shown. To subject any of the materials of the above patents obtained, to such extrusion and then to flaking rolls as in the JP patent ‘220 would have been obvious to obtain a flake feed as in that patent. Nonaka et al. is being used here, only to show that the flaking roll is used in roller mills (see Example 2, specifically at lines 34-35). Therefore, it would have been obvious to use extrusion and roller mills to make the laminates of the feed pellets of the prior art references, namely the GB, the Axelrod and DE patents, which do not teach how to make their products but do teach that their product has dissimilar ingredients. With regard to claim 4, while the primary patents teach fat ingredients, it would have been obvious to one of ordinary skill in the art at the time the invention was made that lipophilic substances such as fat-soluble vitamins are generally a part of fish feed. With regard to claim 7, Axelrod renders obvious the concept that varying density varies with the differences in layers having varying food ingredients, while the arrangement of the fish feed components being at various levels of the pellet itself and fat being on the surface layer suggests

that it would have been obvious to change this and have the protein on the surface and the fat on the inside, this being a matter of choice depending on whether the Axelrod product is required to float or sink and to the *degree* that the pellet should float or sink. With regard to claim 14, wherein the cross section of the extrudate is increased during the rolling out, one of ordinary skill in the art would have reasonably expected that when the pellet in the JP '220 patent is subjected to roller mills, then it would have been flattened out to a flake and it would be inherent that the cross section upon flattening out would be larger. However, Blanchard et al. reinforces this position by showing that the material is stretched by the flaking process. Blanchard is drawn to extrusion and roller mill processes to flake the extrudate. See the entire patent.

Response to Arguments

Applicant's arguments filed 2/20/2009 have been fully considered but they are not persuasive.

Applicant has amended his claims to only a flaked feed and has argued that the GB patent does not teach a flaked feed. However, the rejection is now under 35 USC 103 and should be considered together with JP '220 patent which teaches flattening out a feed pellet to form a flake. Applicant next takes issue with the US '634 patent not showing the dimensions of the feed. No dimensions are claimed, however, and this patent has been withdrawn as is the Bansal patent and Geromini patent.

With regard to the 35 USC 103 rejection, applicant has traversed the Rossen patent stating that the flaked feed shown therein (Fig 19) shows a 2 color triangular

extrudate. However, Fig 23 shows the concentric model of applicant's claim (extrudate only) and by combining such an extrudate with the teaching of the JP patent which teaches flaking a pellet formed from fish feed material, the claims are rendered obvious. Note that the Rossen patent teaches various dissimilar materials being extruded as in Figs. 13-15. Given such various embodiments, one of ordinary skill in the art would have arrived at the invention as claimed based on the combination as applied because one of ordinary skill in the art is presumed to have skills apart from what the prior art references expressly disclose. See *In re Sovish*, 769 F.2d 738, 742 (Fed. Cir. 1985). Given that dissimilar materials were shown by Rossen to be extruded as in Fig 23 and then the JP '220 patent teaching flaking the pellet formed, renders obvious the product and method as claimed and applicant has not shown that producing a flake with concentric zones was "uniquely challenging or difficult for one of ordinary skill in the art" or "represented an unobvious step over the prior art." See, e.g., *Leapfrog Enter., Inc.*, 485 F.3d 1157, 1162 (Fed. Cir. 2007). It is a basic principle that the question under 35 U.S.C. § 103 is not merely what the references expressly teach but what they would have suggested to one of ordinary skill in the art at the time the invention was made. See *Merck & Co. Inc., v. Biocraft Labs., Inc.*, 874 F.2d 804, 807 (Fed. Cir. 1989). Nor is it necessary that suggestion or motivation be found within the four corners of the references themselves. "The obviousness analysis cannot be confined by [the] formalistic conception of the words teaching, suggestion, and motivation, or by overemphasis on the importance of... the explicit content of issued patents." *KSR*, 127 S. Ct. at 1741. The Supreme Court also noted in *KSR* that an obviousness analysis

"need not seek out precise teachings directed to the specific subject matter of the challenged claim, for a court can take account of the inferences and creative steps that a person of ordinary skill in the art would employ." *Id.* The test for obviousness is what the combined teachings of the references would have suggested to those of ordinary skill in the art. *In re Young*, 927 F.2d 588, 591 (Fed. Cir. 1991); *In re Keller*, 642 F.2d 413, 425 (CCPA 1981). "Non-obviousness cannot be established by attacking references individually where the rejection is based upon the teachings of a combination of references." *In re Merck & Co.*, 800 F.2d 1091, 1097 (Fed. Cir. 1986).

Applicant's pointing to the examples of the JP patent (see page 9 of his remarks) to show that the feed of that patent was in two types of feed and not in a single unit is also not convincing because applicant has chosen to ignore all the remaining references and has argued against the JP reference as though this rejection has been made under 35 USC 102. Nowhere is this more evident than in his discussion of the Nonaka patent which clearly was produced as a reference merely and only to establish that flaking rolls were used in roller mills, which in fact, the rejection said so, and yet, applicant has argued that the reference does not teach a flaked feed. Such traversals to establish patentability are not only unjustified but erroneous and do not aid in advancing the prosecution of this case.

Conclusion

Any inquiry concerning this communication or earlier communications from the examiner should be directed to C. Sayala, whose telephone number is (571) 272-1405. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

**/C. SAYALA/
Primary Examiner, Art Unit 1794**